PD-1445-16
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 9/8/2017 1:39 PM
Accepted 9/11/2017 4:54 PM
DEANA WILLIAMSON
CLERK

No. PD-1445-16

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
9/11/2017
DEANA WILLIAMSON, CLERK

FRED EARL INGERSON, III, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Hood County

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STATE PROSECUTING ATTORNEY'S
REPLY BRIEF

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Introduction: A Principled Approach

The presentation of facts in a light most favorable to the verdict and gross mischaracterization or misconstruction are not the same. Appellant asserts that the State misconstrues the record, meaning the State has interpreted it mistakenly. In support, he proffers an alterative unreasonable hypothesis that the jury flatly rejected

for good reason. His postulation is entitled to zero deference. The State's, 100 percent.

There is more at stake than a claim that the court of appeals "managed to get it wrong." *See* Appellant's Brief at 14. The lower court's decision is published and will therefore be used as precedent in circumstantial evidence cases to justify the application of the "illegitimate divide-and-conquer and alternative reasonable hypotheses analytical frameworks." *See* State's Brief at 2; *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012) (reversing on sufficiency based on the incorrect application of *Jackson*). The crime is also significant—as it relates to society and the victims and their families. "Death is different," even when we are speaking of the qualitative nature of this crime from the perspective of society, the victims, and their families. *Cf. Gardner v. Florida*, 430 U.S. 349, 358-59 (1977) (death is a different kind of punishment under the Due Process Clause). Because of this, non-death-penalty capital murder cases demand the same elevated scrutiny for adherence to precedent to ensure systemic equality that is proportionate to a defendant's right to Due Process. *Compare* TEX. CODE CRIM. PROC. art. 37.071 § 1 *with* § 2(h); *cf. Gardner*, 430 U.S. at 358-59. The State's decision not to seek the death penalty should not diminish the particular importance these cases have traditionally had before this Court.

Reply: A Principled Application

To avoid redundancy, given the existing lengthy briefing, this response is limited to the indisputable factual assertions Appellant declares as false.

1. Treated Like a "Dog" is Not a Misrepresentation.[1]

Appellant did agree that Richter treated him like a "dog." While interrogating Appellant, the Texas Ranger asked Appellant in various forms if Richter "treated him like a dog." *See* State's Exhibits 153/154 at 17:19:21-17:22:10-13 (entire exchange relayed in this section). And the Ranger equated treatment "like a dog" with "embarrassment." When questioning Appellant, the Ranger claimed this was how Richter's friends had characterized her interactions with Appellant. In response to the Ranger's first "dog" inquiry, Appellant asked him to explain what he meant. The Ranger said, "Did she ever embarrass you in front of people?" Appellant first responded with a sigh, and when pressed again, said "no." Continuing with the "embarrassed" term, the Ranger asked again, noting that her friends provided this information. Appellant said "no" but then stated she was "bi-polar" and flipped back and forth, shaming her body and then later dancing in a parking lot. The Ranger again referred to Richter's friends and told Appellant that they claimed she talked

[1] *See* Appellant's Brief at 15-16.

down to him in public. Appellant agreed, stating "yeah" and nodding his head up and down. Later, when the Ranger told Appellant "she belittled you," Appellant sighed and said, she is "just like that though." State's Exhibits 153/154 at 17:22:10-13.

A rational jury could infer that Appellant expressly adopted the Ranger's characterizations—an elaboration of "like a dog"—as an accurate portrayal of his experience with Richter.

2. Felt Like a "Mark" Is Not a Misrepresentation.[2]

The record supports the conclusion that Appellant considered himself to be a "mark." First, Appellant stated that, based on Richter's exhibition of a wad of cash, he thought she either had a "sugar daddy" or was "using somebody." State's Exhibits 153/154 at 16:54-55. Appellant also recalled that, when Richter asked him for $1,500, she would act like she was joking and kidding. State's Exhibits 153/154 at 15:55:15-24. Appellant, however, viewed it as Richter "testing" him and told her so.

Next, when the Ranger confronted Appellant, saying "Robyn was using you. Robyn was doing you wrong . . . She was asking you for money. She was using you." Appellant responded, saying, "Well, but I didn't let her use me." *See* State's Exhibits 153/154 at 17:15-17:22. The Ranger told Appellant he believed Appellant to be the

[2] *See* Appellant's Brief at 16-19.

type of guy who did not let that happen but "Robyn was a con artist." Appellant said, "Yeah, but I did not give her any money."

Later, Appellant said Richter wanted a relationship with him because he could give her a stable life. State's Exhibits 153/154 at 17:29:43-17:30:26. Richter told Appellant she had married for the "all the wrong reasons"—"money." The Ranger interjected, "So here you are the next person?" Appellant said, "Right, the next person." He "saw that" and thus only wanted a friendship. That Appellant told the Ranger that he and Richter mutually agreed to be "friends" does not negate the jury's prerogative to reject his version. Indeed, Appellant had previously just acknowledged that he had considered the possibility of a romantic relationship and recounted an intimate discussion the two had. Appellant said Richter told him she had a hysterectomy, so he asked, "You had a hysterectomy, you're not horny, are you?" She said "no" and told Appellant she did not take hormones. State's Exhibits 153/154 at 16:41:19-50.

This evidence, in combination with other evidence outlined in the State's Brief, supports the inference that Appellant thought Richter's motives were disingenuous.

3. Animus from Racist Remarks is Not a Misrepresentation.

Appellant's racism caused him to become angry at Richter. A Miyako's chef overheard Richter, Ferris, and Appellant talking about a relationship. 6 RR 41-42.

He then heard Appellant say, "Fucking niggers." 6 RR 44. He did not believe Appellant was joking. 6 RR 45. It caught his attention, like "Whoa," and he said to himself, "Well guess it's time for me to go then." 6 RR 45-46. Though Richter and Ferris did not seem offended, and everyone else was "okay," the chef was upset and believed others would be offended. 6 RR 45. This can accurately be described as Appellant having made a "spectacle of himself." *See* Appellant's Brief at 19. And that Appellant's behavior may have been the norm does not undercut the fact that a rational jury could infer that Appellant was upset with Richter for dating an African—a race he obviously deemed inferior. Appellant's reference to "jigaboo" music is consistent with this mind-set. Derogatory racial remarks are made by individuals who are racist. The timing is also important. His declarations occurred while Richter was also trying to manipulate him. And a rational jury could easily infer that Appellant was specifically referring to Sylla, because Appellant made it clear that Richter was consumed with talking about and trying to contact him. State's Exhibit 165 at 18:51-52, 18:55.

4. Lynn Harper's "Surprise" is Not a Misconstruction.[3]

Appellant's late-night call and visit to Harper were not planned. No "firm" plans had been made between them before he left for Miyako's. 8 RR 91. Harper

[3] *See* Appellant's Brief at 29-30.

was asleep when he called shortly after mid-night, and she got up and showered, "Expecting for my boyfriend to come over and be intimate with him." 8 R 93. A rational jury could infer that, had she expected Appellant that night, she would have showered earlier instead of the middle of the night after being woken up. Further, Appellant went home and packed an overnight bag before driving an hour and a half to Harper's house. 8 RR 93. Appellant's own actions show a spur-of-the-moment plan to visit Harper. And Harper stated that this was the first time Appellant called and visited in the middle of the night. 7 RR 94. A rational jury could conclude that Harper did not expect a mid-night call from Appellant or for him to come to her house in Arlington. Describing the circumstances from her perspective as a "surprise" is not a factual inaccuracy.

5. Bullet Inaccuracy, which Ultimately Establishes Dangerousness.[4]

Appellant did not retrieve the 130-grain bullets when his ex-wife gave him the gun. Appellant is therefore correct about this fact. *See* Appellant's Brief at 25. This, however, does not benefit Appellant. Instead, it highlights Appellant's dangerous character. Appellant's ex-wife testified that she did not want the gun in her house when Appellant came to get his things. 4 RR 239. Appellant recalled that she kept

[4] *See* Appellant's Brief at 25-26.

denying his requests to get the gun. State's Exhibit 198 at 32:10-13, 33:05-27, 46:24-27. She had refused to give Appellant the gun until he was ready to return to Texas. Most importantly, she specifically chose to keep the bullets that had previously been loaded in the gun. 4 RR 239-40. She explained, "I didn't feel safe with it loaded" and "I didn't want him having both." 4 RR 239-40. A rational jury could infer that Appellant had said or done something to threaten harm to her and caused her to fear he would shoot her. If Appellant would shoot his ex-wife, it is not inconceivable, from the perspective of a rational jury, that he would shoot and kill a women who embarrassed, manipulated, and rejected him.

And while having a handgun in Texas is not unusual, *see* Appellant's Brief at 29, this practice—as indicated by Melissa Russell, 8 RR 51-55 (gun, loaded with .38 ammunition, and a box of ammunition), Appellant, State's Exhibit 198 at 53:05-23,[5] and the presence of the gun under his car-seat the day after the murders—supports the finding that Appellant kept a handgun in a place easily accessible at the time of the murders.

[5] Russell's soon to be ex-husband was harassing Appellant because of his relationship with Russell. Russell was concerned. Appellant told her, "Don't worry I've got protection." State's Exhibit 198 at 53:05-23.

Conclusion

Like the court of appeals, Appellant engages in a divide-and-conquer analysis and fails to give due deference to the jury's verdict. An analysis by an interested party that assigns an entirely new meaning to the same evidence weighed by the jury is exactly what the sufficiency standard is designed to preclude. Evidence considered and clearly rejected by the jury has no rightful value on appeal when assessing sufficiency.

PRAYER FOR RELIEF

The court of appeals' decision should be reversed, and the trial court's judgment should be reinstated.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 1,706, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ *Stacey M. Soule*
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State Prosecuting Attorney's Reply Brief has been served on September 8, 2017, *via* email or certified electronic service provider to:

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